The Central Law Journal.

ST. LOUIS, FEBRUARY 18, 1881.

CURRENT TOPICS.

The duty of a finder with reference to the identification of lost articles by their owner, received a very clear and pointed exposition recently in the case of Wood v. Pierson, decided by the Michigan Supreme Court. The action was replevin, by the owner of a lost diamond pin against the finder, with whom was joined a jeweler to whom it had been entrusted by the finder, during his temporary absence from the city, for safe-keeping, pending identification by the owner. The owner had offered a reward of $25 through the public prints, to be paid upon the leaving of the pin at the office of the newspaper. This requirement as to the place of payment was dispensed with by the parties, as appears from their acts in the premises, and cuts no figure in the case. The owner upon learning that the pin was at the jeweler's, called there for the purpose of identifying it, and asked to see it. This, Wood, the jeweler, declined, and required him to describe it first. The owner attempted to do this, but he failed to satisfy Wood and also another jeweler, to whom both referred, and who had the advantage of inspecting the pin, of the righteousness of his claim. He then requested that another jeweler who he said had formerly repaired the pin, and had a plaster cast of the stone, and could identify it, might be permitted to see it. This gentleman came, but had no cast, and was unable to give a particular description, and Wood declined to show him the pin. Pierson, the owner, proposed that the pin should be sent, at his expense, for the purpose of identification, to Mr. Smith, of Detroit, who, he said, had mounted it. Wood declined to do this, but made the suggestion that Pierson should write to Smith for a description, as being attended with less risk. This was unacceptable to Pierson, who sued out a writ of replevin, but the officer failed to find the pin. In the mean while, Chapman, the finder, who had returned to the city, had taken the pin to Detroit, seen Mr. Smith and satisfied himself that it was Pierson's property. Upon his return, he handed it to the officer, with the request to get the reward. Pierson refused to pay, and on giving the usual replevin bond, received the pin from the officer. The court (GRAVES, J.,) reversed a judgment for Pierson, and remanded the cause for a new trial, on the ground that Chapman had a lien for the reward, citing Prescott v. Neale, 12 Gray, 222; Wentworth v. Day, 3 Met. 352; Cummings v. Gann, 52 Pa. St. 484; Story on Bailments, §§ 121a, 621a; 3 Parsons on Contracts, 329 (6th ed.); Edwards on Bailments, §§ 20, 68 (2d ed.) Whether Chapman's conduct with reference to the identification was fair and reasonable under all the circumstances of the case was held to be a question for the jury. As to the finder's duty with reference to the care and identification of lost articles, the court quotes the quaint language of Lord Coke in Isaac v. Clark, 2 Bulstrode, 306: "When a man doth find goods, it hath been said and so commonly held, that if he do dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Edw. IV. 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody; but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely. A man therefore, which finds goods, if he be wise, will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him and demands them, and he answers that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion if he do keep them for him."

An interesting decision has recently been rendered by the New York Common Pleas Court, on the subject of the effect to be given to the regulations of a savings bank relative to the payment of money to depositors. The plaintiff sued to recover money paid to an unauthorized person. Among the rules printed in his bank-book, was the following: "Drafts may be made personally, or by the

order in writing, of the depositor (if the bank have the signature of the party on their signature book), or by letters of attorney duly authenticated; but no person shall have the right to demand any part of his principal or interest without producing the original book, that the payments may be entered therein. * * * * All payments, made to persons producing the deposit book, shall be deemed good and valid payments to depositors respectively." The signature of the plaintiff was upon the signature book of the defendant. Some unauthorized person got possession of his depoit book and received payment of the deposit. It is to be inferred from the somewhat imperfect report of the case which has reached us, that the money was drawn, not only by the presentation of the book, but also that receipts were signed, the signatures to which were not the same as the plaintiff's signature in the signature book. The court (BEACH, J.,) reversed the judgment of the Marine Court, refusing to dismiss the plaintiff's complaint, saying: "These regulations do not absolve the bank officials from the exercise of ordinary care when making payment upon the faith of the depositors' books. Under this principle, however, it is needful for the plaintiff, upon a trial involving the validity of such payments, to give proof of facts tending to show a failure to exercise reasonable care and prudence in disbursing the money. If, for instance, the signature of the receiving person should present a marked and noticeable dissimilarity to that of the depositor upon the bank's books, the failure to discover it would be evidence of negligence to be passed upon by a jury. In the case at bar the record contains no proof of any such facts, and none upon which negligence by the bank officials could possibly be predicated. Schoenwald v. Met. Savings Bank, 57 N. Y. 418; Appleby v. Erie County Savings Rank, 62 N. Y. 12."

This case is not without difficulty. It seems illogical that a party should be concluded by the act of an intervening third party, which he did not authorize. At the same time it is difficult to escape from this result as the consequence of the regulation that "all payments made to the person producing the deposit book shall be deemed good and valid payments to depositors respectively." Although the payment was in a certain sense a payment upon a forged order or check, because the signature to the receipt was different from the plaintiff's signature book, the case is to be distinguished from that class of cases, in which the relative rights of two innocent parties dealing with forged commercial paper are determined; for there the negotiability of the paper, and the presumptions arising in its favor, are the controlling elements. See note to Baxendale v. Bennett, 7 Cent. L. J., 348, and authorities cited. In this case both parties were negligent; the plaintiff, in permitting the custody of his deposit-book to pass into the hands of an unauthorized party; the defendant, in paying the deposit, upon the faith of the custody of the book, to a person whose signature did not correspond to the signature in their signature book. If there were no other element in the case, it would seem reasonable that the bank should suffer the loss. But the regulation, which, under the circumstances, is in the nature of a contract between the parties, that a payment to a person producing the book should be considered a payment to the depositor, seems to have properly controlled the court's decision.

It begins to look as if this country is really to have an international copyright treaty with Great Britain. Through the efforts of Mr. Lowell a draft of an International Copyright Convention has been submitted to the English government. It is not a direct proposal, but rather a basis for further discussion and negotiation. It proposes that an English author shall only have his book protected in the United States, on condition that the American edition is manufactured and published in this country, and *vice versa*. The object of this provision is, of course, to extend the principle of protection to American printers and paper makers.

The New York legislature are considering a proposed law which has for its object the re-establishment of the whipping-post, as a punishment for wife-beaters. This measure is understood to emanate from Mr. Bergh, who has acquired so much notoriety by his efforts towards the prevention of cruelty to animals.

THE LIABILITY OF AN UNNAMED PRINCIPAL.

The case of Irvine v. Watson,[1] recently decided by Bowen, J., on further consideration, establishes an important distinction between cases where an agent, in contracting for the purchase of goods on account of his principal, makes no mention of his principal at all, and cases where he mentions the existence of a principal, but does not mention his name. It was held, that whereas in the former class of cases, the seller, upon discovery of the principal, can not have recourse to him if, in the meanwhile, the principal has *bona fide* settled with the agent for the price of the goods, in the latter class of cases, the seller may be entitled to have recourse to the principal, though he has *bona fide* paid the agent, unless there has been such conduct on the seller's part—*e. g.*, delay in applying to the principal—as might justify the principal in concluding that the seller was not looking to his credit, but that of the agent.

Though the law on the subject is at present well settled, originally there was some doubt as to the position of the principal when the agent, in making the contract, had not mentioned his existence. The leading authority on the subject is Thompson v. Davenport.[2] In that case, it was held that the seller could only have recourse to the principal, on discovering his existence, if he had not meanwhile paid the agent, or the state of the accounts between the priucipal and agent did not render it inequitable that the seller should any longer look to the principal for payment. The statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller, was thought by Parke, B., and the other judges, in the subsequent case of Heald v. Kenworthy,[3] to be too large without further explanation, and they expressed the view that the only case in which the seller, under such circumstances, was precluded from having recourse to the undisclosed principal, when discovered, was when the seller, by some conduct of his own, had misled the principal into paying or settling with his agent in the *interim*. But in the case of Armstrong v. Stokes,[4] the Queen's Bench did not adopt this narrower view, and they revert to the wider language used by Lord Tenterden in Thompson v. Davenport. It is now, therefore, the law that a seller who has given credit to an agent, believing him to be a principal, can not have recourse to the undisclosed principal, if the principal has *bona fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal.

Doubts have been expressed whether, under any circumstances, the seller ought to be allowed to have recourse to a person to whom he never gave credit, and whom he did not know in the transaction at the time when the contract was made. But, on the whole, it would seem that if there has been no settlement between the agent and the principal, and no other circumstances exist, rendering it inequitable that the seller should have recourse to the principal, it is just that he should be allowed to have such recourse. The seller has not been paid for his goods, the agent had authority to pledge the principal's credit, and the principal has had the benefit of the goods. Why should not the party who has had the benefit of the goods, not having paid for them, pay their price to him who has parted with his goods in consideration of being paid such a price? If the seller is allowed to look only to the agent, it must be on the footing that the sale of the goods is only as between the seller and the agent. What, then, is the relation between the agent and the principal, as regards the goods? Clearly, the agent can not be vendor of the goods to his own principal. It seems to create a legal illogicality if, though the agent buys for the principal, the seller is not to be held to have sold to the principal. It seems logically to follow that if the agent can not pay for the goods, and therefore, the seller will not deliver them, the principal could not enforce delivery on tendering the price. If the seller is to have no rights upon the contract against the principal, would it not follow that the principal can have no rights against him? It would appear that the true view must be that the sale is really one to the undisclosed principal, and that the ordinary relation of seller

[1] 28 W. R. 353; 10 Cent. L. J. 233.
[2] 9 B. & C. 78.
10 Ex. 745.
[4] L. R. 7 Q. B. 599.

and purchaser arises between the seller and the principal, when the latter is discovered or discovers himself,[5] subject to the proviso stated in Thompson v. Davenport. That proviso appears to be in the nature of an equity arising by way of exception to the general rule, that the seller is entitled to treat the principal as the purchaser of the goods on discovering him. The true basis of this equity seems at first sight somewhat doubtful. The question may be asked why, inasmuch as the principal knew that the agent was contracting on his behalf with another, that other should not have as against him all the rights that arise under a contract of sale made without the intervention of an agent? It appears to us that the doctrine must rest on some such considerations as these. It would be inconvenient, as a matter of business, that the principal should in all cases be obliged to seek out and pay the seller, whether the seller demanded payment of him or not. The purchaser may not know who the seller is, or may know littie or nothing of him, and the more natural and convenient course of business would, probably, in many cases be for payment to be made to the agent, as the party whom the purchaser knew in the transaction. The seller, who was content in the first instance to contract with the agent as a principal, and who gave credit to him, and not the principal, can not say that it is any hardship upon him to look to the agent for payment if the purchaser has already paid the agent.

Bowen, J., in Irvine v. Watson,[6] held that different considerations apply to the case when a principal's existence is disclosed, though his name is not disclosed. The reasons for this distinction may be gathered from his judgment. The difference between the two classes of cases seems to be that the seller, when the existence of a principal is disclosed, may be considered as, to some extent, relying on the credit of the unnamed principal. It was a part of the contract in the case we are discussing, that the seller should be entitled to a disclosure of the name of a principal, deemed satisfactory by the selling broker, by a certain time, or else that the purchasing broker should be liable as principal himself. It seems somewhat strange, but it does not appear from the statement of the facts made by the learned judge, whether this term was insisted on, and the name of the principal demanded by the plaintiffs. If not, an argument might have arisen that the plaintiffs had elected to trust the agent. It would appear probable that the name of the principals must have been disclosed in accordance with the terms of the contract. If the seller is to be considered as relying to some extent, at least, on the credit of the principal, it is obvious that the case differs very materially from the first class of cases, where the existence of a principal is not disclosed until after payment made to the agent. It may be urged on behalf of the principal in such a case, that he does not know that the agent has disclosed the existence of a principal, but that is answered by the fact that he has authorized the agent to bind him to a third party, and knows that he has done so. It seems, perhaps, rather strange that, the principal's conduct having been exactly the same in both classes of cases (for in either case he may not know what the agent has done with regard to the disclosure of his principal), in the one he should have to pay twice over, and in the other not. But in the first class of cases the seller, having been content to contract upon the credit of the agent only, has no hardship to complain of, if, the principal having paid the agent, he is compelled to look to the person with whom alone he contracted for payment. In the latter class of cases the seller has relied upon the credit of some one behind the agent, and that person did authorize the agent to pledge his credit. Therefore, at least, there are counterbalancing considerations on either side, and it would appear that the general rule of law, which makes the principal liable upon the contract, must prevail as against the special exception allowed to prevail in the case where, the seller having treated the agent as principal, it is no hardship upon him to be obliged to look to the agent only.

The qualification of the rule laid down in the case we are discussing, is an obviously just one. If the seller in a case of this sort, where it is doubtful whose credit he is looking to, pursues a course from which the principal may fairly conclude that he is looking to the credit of the agent only, the principal is then justified in paying the agent, and can

[5] *Supra.*
[6] *Supra.*

not be compelled to pay over again to the seller. It seems to us that the distinction made between the two classes of cases in Irvine v. Watson, is a somewhat fine one, but still the reasons given for it are of great weight and substance. If this case goes to appeal, we shall look for the decision with considerable interest; for there seems to us to be a good deal to be said on both sides.—*Solicitors' Journal.*

THE LIABILITY OF BANKS IN MAKING COLLECTIONS FOR THE ACTS OF CORRESPONDENTS AND NOTARIES.

This question has ever been the subject of learned discussion in the legal profession, and has been submitted for decision to almost every court of this country and England. As it very often happens in cases of doubt and uncertainty, the different courts which have passed upon the liability of banks, acting as collecting agents, have delivered contrary opinions. The conflict of laws of the different States in such cases has produced no little confusion. As the law now stands, if a citizen of Missouri puts a note into a Missouri bank for collection, the maker residing in New York, and the note is sent to a New York bank for collection; if damage results to the citizen of Missouri from the negligence of the New York bank, it is doubtful whether he has any remedy. If he brings suit in Missouri against the Missouri bank, it would seem that, since the contract with the Missouri bank was entered into in this State, the law of this State would determine the liability of the bank, and, as the Missouri cases hold the principal bank responsible for its own negligence only, the Missourian would be nonsuited; but if he should bring the action against the New York bank, the contract with the New York bank being consummated in New York, the law of New York would govern its liability, and as the New York cases hold that the principal bank is responsible for the negligence of its agents, he would again be nonsuited. The latter proposition is not clear, and possibly the action would be sustained under the Missouri law, as being a continuation or a part of the contract entered into with the Missouri bank by the supposed citizen. However, be that as it may, it suffices to show the doubt and uncertainty created by this contrariety of legal and judicial opinion. This is an unfortunate condition of the law, and should be speedily remedied, if possible, by legislative enactment. In all matters of this kind, affecting so seriously contracts arising in our inter-State commerce, the law should be uniform throughout the land. The purpose of this article, however, is not to show how and by what means this uniformity might be attained; but to show, if possible, which view of the bank's liability is sound, when tested by the fundamental principles of the common law, and the custom and common understanding of merchants. We will divide the subject, for convenience, into two heads, viz.:

1. The liability of the bank in cases of collections for the acts of its corresponding bank.

2. Its liability for the acts of the notary employed to make the demand and protest for nonpayment.

1. As has been already intimated, the courts of this country and England are at variance on this subject. The courts of England, New York, Ohio, Indiana, Maryland and South Carolina, fix the liability for the negligence or other act upon the bank receiving the collection, (Van Wart v. Wooley, 3 B. & C. 439; Allen v. Merchants' Bank, 22 Wend. 215; Montgomery Bank v. Albany Bank, 3 Selden, 459; Commercial Bank v. Union Bank, 1 Kern. 203; Reeves v. State Bank of Ohio, 8 Ohio, St 465; Young v. Noble, 2 Disney (Ohio), 485; American Express Co. v. Haire, 21 Ind. 4; Citizens' Bank of Baltimore v. Howell, 8 Md. 530; Mechanics' Bank v. Earpe, 4 Rawle, 384; Thompson v. Bank of South Carolina, 3 Hill, (S. C.) 77; Taber v. Perrot, 2 Gallison, 565; Tyson v. State Bank, 6 Blackf. 225; Abbott v. Smith, 4 Ind. 452); while the courts of Massachusetts, Pennsylvania, Connecticut, Louisiana, Illinois and Missouri, hold the collecting bank alone, responsible to the owner for its own negligence. Fabens v. Mercantile Bank, 23 Pick. 330; Dorchester and Milton Bank v. New England Bank, 1 Cush. 177; Warren Bank v. Suffolk Bank, 10 Cush. 583; East Haddam Bank v. Scovil, 12 Conn. 303; Jackson v. Union Bank, 6 Har. & J. 146; Baldwin v. Bank of Louisiana, 1 La. An. 13; Bellemire v. Bank of the United States, 4 Whart. 105; Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243; Daly v. Butchers and Drovers' Bank, 56 Mo. 94; Farmers' Bank of Virginia v. Owen, 5 Cr. C. C. 504.

For a thorough comprehension of the responsibility of the parties to the transaction, it is necessary that we should understand, as a matter of fact, what is the custom among merchants as to collections in bank, and the nature of the contract made by them with the receiving bank. A merchant, having a note or draft, places it in his local bank, which undertakes its collection by means of its immediate agents, if it is to be collected in the same place, and, if elsewhere, by the employment of another bank or banker located in the place where the money is to be collected. Where the ordinary agents and clerks are employed in collecting, it is clear that the bank will be liable for all damages resulting from their torts, whether they be of misfeasance or non-feasance. Bank of Utica v. McKinstre, 11 Wend. 473; 2 Parsons on Contracts, 103; 2 Kent's Commentaries, 571 n. (a), and cases there cited. The ordinary rule of *respondeat superior* is applied without any restrictions, and the bank held liable for all such acts of

its agents. But where the collection is such that it necessitates the employment of agents other than the ordinary officers and clerks, as a corresponding bank in another place, great difficulty is experienced in properly defining the liability for damages resulting from the negligence of the corresponding bank. One set of decisions absolves the receiving bank from responsibility, and makes the collecting and negligent bank directly responsible to the owner of the negotiable paper. It is held in these decisions that the collecting bank is the agent of the owner, and appointed such by the receiving bank under the authority given it by its contract with the owner. They further decide that the obligation of the receiving bank is, in the absence of any special contract to the contrary, to select a suitable agent in the place where the debtor resides, and to transmit the paper to him for collection. When the receiving bank has exercised all due care in the selection of the agent and the transmission of the papers, its responsibility is at an end, and the owner must look to the corresponding bank or other agent for compensation, if damage should thereafter result to him through the negligence of the latter. These decisions establish as a conclusion of law, that the contract with the receiving bank is simply for transmission, and that in selecting the agent for collection, the receiving bank is acting as the agent of the owner, and not on its own responsibility. The other set of decisions hold as a conclusion of law, that such contracts are agreements by the receiving bank to collect the amount due, and to take all proper precautions for saving the rights of the owner against all parties bound to him by the instrument of indebtedness; or, to use the comprehensive language of the New York Court of Errors, in Allen v. Merchants' Bank, (*supra*): "When a bank or broker, or other money dealer receives upon a good consideration a note or bill for collection, in the place where such bank, broker, or other money dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, either in negotiation, collection, or paying over the money, by which the money is lost or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied." These decisions declare then the contract to be one for collection with the ordinary responsibility for the neglect and omissions of agents, and make it necessary to show a special contract to change or diminish the responsibility of the receiving bank.

The case of Bank of Washington v. Triplett, 1 Peters, 25, in the United States Supreme Court, has often been cited in support of the theory that the receiving bank is not liable for the torts of the collecting bank. But Chief Justice Marshall decided the case on a question of fact. The evidence showed clearly that the Washington Bank was the agent of Triplett & Nea and recognized as such by them, and that the Alexandria Bank acted only as their agent in securing proper agents at Washington for the collection. The chief justice said: "That the bill was not delivered to the Mechanics' Bank at Alexandria for collection, but for transmission; that the bank in Washington became the agent of the holder; that the bank in Alexandria performed its duty by transmitting the bill, and the whole responsibility of the collection devolved upon the bank, which received it for that purpose." This decision, therefore, only establishes the principle that, where the contract with the receiving bank is one for collection, it is generally liable for the torts of the corresponding bank; and where the contract is for transmission only to a suitable agent, the liability is limited to the exercise of due care in the selection of the agent. All the cases cited in support of the restricted liability of the receiving bank, admit the proposition laid down by Chief Justice Marshall, but they decide as a conclusion of law, what the chief justice treats as a question of fact, decided by the jury upon the facts of that particular case. It may therefore be considered as determined, that if the receiving bank by its contract with the owner had agreed to collect the note or bill, it is liable for all damage resulting from the acts of its agents, whoever they might be; on the other hand, if the contract only obligates the receiving bank to transmit to a suitable agent for collection, then its liability is at an end, if it has exercised proper care in the selection of the agent. The question then resolves itself into one of fact: What did the receiving bank agree to do?

When a merchant deposits a note or bill in a bank for collection, it is generally stated in the indorsement, that it is for collection. He makes the deposit, because he is unable to secure its collection as safely in any other way. The bank undertakes collections as one branch of its business, and for the purpose has its regular correspondents throughout the country. Its extensive business relations give it opportunities for knowing the reliability of these agents, which the merchant can not have. When a note is sent by one bank to another, the merchant does not know the latter, nor does the latter bank know any one as the owner of the note but the transmitting bank. The owner of the note looks to the receiving bank, and expects it to make a return of the collection. He knows no other party to the transaction; has no communication with the corresponding bank, nor exercises in any other way the rights of a principal in controlling and directing its actions. He expects then, and he should have the right to expect, the receiving bank to assume the duties of principal towards the corresponding bank. The courts of Missouri and of other States say that the receiving bank only undertakes to transmit the note or bill safely to a suitable agent, and does not agree to see to its collection. Now, is it natural to suppose that, if that was the nature of the contract between the receiving bank and

the merchant, the latter would rest content with simply placing the paper in the hands of the receiving bank, and remaining in ignorance of the name and financial standing of the corresponding bank? If he did not consider the receiving bank responsible for the acts of its correspondent, would he not ascertain who that correspondent is, and have direct communication with him? The accommodation in such cases is not simply the transmission. It would be no trouble for the merchant to transmit it to some suitable agent, after ascertaining from well-informed parties the name of such an agent. He does not deposit the note to save himself the mere trouble of writing; not at all. He reasons thus: I know this bank here, and am satisfied as to its financial soundness; I know, if any loss occurs, it will be fully able to meet it, and would save me the annoyance of bringing suit in another place; I will give this bank the collection, and look to it to make good any loss sustained through the neglect of its corresponding bank. It has, I believe, never been disputed that this is the general understanding of merchants. They hold the receiving bank liable in such cases. But some of the courts hold that this common understandig is inconsistent with the deductions of law, and, inasmuch as a custom can not be proven therefrom, it should not be allowed to influence and control the construction of the contract. It is undoubtedly true that a custom can not be proven from the common understanding of merchants as to what the law is; but where this common understanding is well-known to both parties to the contract, and, with this common understanding in view, the merchant enters into the contract, it will be good and sufficient evidence to prove the character of the contract. The merchant, with the understanding that the receiving bank is to be responsible for the collection, deposits the note or bill for collection; the bank officers and clerks are fully cognizant of this understanding, and the contract must be governed by it, unless it can be shown to be contrary to, and unfounded in law.

A number of objections have been raised to such a construction. When this question first came before the courts, it was thought that there was not a sufficient consideration to support the liability of the bank. It has, however, been settled beyond dispute, that the receipt of the note or bill for collection is sufficient consideration to support the contract. The use of the money when collected; the securing of other more profitable business through this accommodation; its being a part of the bank's regular business—all go to establish a consideration sufficient to render the bank liable for the acts of its agents. Smedes v. Utica Bank, 20 Johns. 372; s. c., 3 Cowen, 662; Bank of Utica v. McKinstre, 11 Wend. 473; Mechanics' Bank v. Merchants' Bank, 6 Met. 13; 2 Parsons on Contracts, 103; 2 Kent's Com. 571, n (*a*). Another equally untenable objection is, that in the collection of foreign negotiable paper, it is necessary, from the nature of the case for the collecting bank, to employ agents other than its ordinary agents for the collection. If this objection were sustainable as a legal ground for restricting the liability of the principal bank in cases like this, it would be equally strong in a variety of cases, and its adoption by the courts as a principle of the law of agency would unsettle all the preconceived notions of the relation of principal and agent. There is hardly an occupation in which it is not necessary to employ agents. The receiving bank acts only by its agents, whatever may be the character of the business; the contractor must employ workmen, in order to fulfil his agreement, and so on through every variety of business transactions. If it was not the regular business of the bank to receive such paper for collection, and it was done only in exceptional cases, as a special accommodation to a particular person, an objection of that character might be sustained. But collection is the regular business of banks, and for the purpose they have their regular correspondents in different places, who mutually attend to each others's collections. The fact that this collection business is so general, makes the correspondents as much their regular agents for the purposes of collection, as the cashier or teller. They are in fact regular, though special agents. Our conclusion, therefore, is, that no principle of law would be violated by placing the liability for losses upon the receiving bank; and such a construction, being in unison with the custom and common understanding of merchants, and in conformity with the necessities of commerce, should be the prevailing law throughout the country. The contract with the bank, under this construction, would be a bailment, and would not create the simple relation of principal and agent between the owner of the note and the receiving bank.

The Supreme Court of New York, in Montgomery County Bank v. Albany Bank, 8 Barb. 396, held that the collecting bank would be the agent of both the receiving bank and the owner of the note or bill. This is not sound law, and in direct conflict with the best-established principles of the law of agency. The decision of the Supreme Court in that case was reversed by the Court of Appeals, (see 3 Seld. 459), and it was there held that the receiving bank was alone responsible to the owner of the note for neglect in presenting the bill for payment, by which the indorsers were released; and that the negligent corresponding bank was responsible only to the receiving bank. There is no privity between the correspondent and the owner, and consequently no obligation. The doctrine of *respondeat superior* imputes the negligence to the principal, and protects the agent from any action brought by any one but his principal. But this protection can be afforded him only in cases of non-feasance or negligence. Where he is guilty of a positive wrong or misfeasance, he is responsible alike to principal and third persons injured thereby. Lord Holt un-

folds this doctrine very clearly in his celebrated judgment in the case of Lane v. Colton. 12 Mod. 488: "It was objected at the bar," said he, "that they have this remedy against Breese. I agree, that if they could prove that he took out the bill, they might sue him for it; so they might any body else, on whom they could fix that fact. But for a neglect in him, they can have no remedy against him, for they must consider him as a servant; and then his neglect is only chargeable on his master or principal; for a servant or deputy, *quatenus* such, can not be charged for neglect, but the principal only shall be charged for it. But for a misfeasance, an action will lie against a servant or deputy, not *quatenus* a servant or deputy, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner, by neglect, to escape, the sheriff shall be charged for it, and not the bailiff. But if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself; for then he is a kind of wrong-doer or rescuer; and it will lie against any other that will rescue in like manner." This distinction between misfeasance and non-feasance, as to the liability of the agent to third persons, rests upon well-founded principles, however refined it may appear. There being no privity between the agent and the third person, and the duty of the agent arising solely from the contract of agency, and not from operation of law, he is under no legal obligation to the third person. A man can not be held responsible for failing to do what he he has not promised to do. But where the act is a tortious misfeasance, then a direct and positive wrong is committed, for which he must answer to the party injured, as well as his principal. *Respondeat superior* will protect an agent from responsibility for his acts of non-feasance, but no principle of agency will protect one from responsibility for his wrongful acts of commission, as no agency can be created which can authorize one to commit a positive wrong upon another's rights, without being responsible therefor to the injured party. Story on Agency, §§ 308, 309. When, then, the courts hold that an action can not lie against the corresponding bank, the decision only goes to the length of preventing such action for negligence. Where the corresponding bank is guilty of an actual and positive tort, a misfeasance instead of a non-feasance, it is amenable alike to an action by the receiving bank and the owner of the note. Thus it has been repeatedly held, that the owner can maintain an action against the corresponding bank, where it holds the proceeds of the collection in satisfaction of a debt due it by the receiving bank. This is a positive wrong, a misfeasance, and the action is properly laid. Milliken v. Shapleigh, 36 Mo. 596; Bank of Metropolis v. New England Bank, 6 How. 212; Jones v. Milliken, 41 Pa. St., 252; McBride v. Farmers' Bank, 25 Barb. 657; Reeves v. Ohio State Bank, 8 Ohio St. 465.

2. The courts are also divided on the question of the bank's liability for the acts of the notary employed to make the ordinary demand and protest for non-payment. Allen v. Merchants' Bank, 22 Wend. 215; Gerhardt v. Boatmen's Savings Inst., 38 Mo. 60; Agricultural Bank v. Commercial Bank, 7 S. & M. 592; Ayrault v. Pacific Bank, 47 N. Y. 570; American Express Co. v. Dunlevy, 3 Am. Law Reg. 266; Governor to use, etc. v. Gordon, 15 Ala. 72; Hyde v. Planters' Bank, 17 La. An, 560; Bellemire v. Bank of the United States, 1 Miles, 173; s. c., 4 Wharton, 105; Citizens' Bank v. Howell, 8 Md. 530; Smedes v. Bank of Utica, 20 Johns. 372. Senator Verplanck, in his able opinion in Allen v. Merchants' Bank, *supra*, says on this point: "If this *laches* had been committed by that officer in that part of his duty, which was peculiarly official, and could only be performed by himself or some other notary, he having been requested or instructed to perform such duty, I doubt whether the collecting bank, or any other institution or person employing him, would be responsible for his neglect in that which was not voluntarily confided to him, but wherein his official duties were rendered necessary by the requirement of the law, and where his employer had done all that was within his power for the performance of the original undertaking. Then it would seem that the notary would alone be responsible." He then proceeds to show, that the *laches*, in that particular case, occurred in the performance of duties, which, although generally intrusted to the care of notaries in connection with their other duties, was not strictly official, and could have been done by any other person.

The liability of the bank for the acts of its notary rests upon the question: Is a notary a public officer? Very few of the decisions cited above meet the question fairly. Most of those which exempt the bank from liability for the negligence of the notary, base this exemption upon the implied authority to appoint a sub-agent, without any responsibility for his acts. If the contract of collection is not a bailment, and is a mere agency with power to appoint sub-agents, then the bank should not be responsible for the acts of the notary, any more than for those of its correspondents. But it would seem that the question is better settled upon the theory laid down by Senator Verplanck in the quotation above. A notary, as regards his strictly official duties, is a public officer, and, according to the rule generally prevailing in such cases, he alone should be held responsible for his negligence. Now what is the official duty of a notary in protesting notes and other negotiable paper for non-payment? The protest by a notary public is only required by the law-merchant in case of foreign bills, and is only necessary so far as the seal of the notary is regarded by all the courts of the civilized world as sufficient proof of demand and refusal to pay. His official duty then is to make the demand, and upon refusal to protest it under his seal for non-payment. It has, however, become the general custom for notaries, after mak-

ing the protest, to give notices of non-payment to indorsers, and all other parties bound by the instrument. This however is not an official duty, and can be performed by any one else. If then the bank is at all exempt from liability, it can not be on the ground that the notary is a public officer, unless his neglect or other tortious act occurs in making the protest. Moreover, inasmuch as the demand and protest by the notary are not absolutely required by law, except in cases of foreign bills, the official character of the notary will not protect the bank from liability in cases of inland bills, since, although it is customary and permissible for a notary to make the demand and protest in such cases, any other unofficial person may do it with the same effect. See cases cited above.

A discussion of a subject like the present one is always unsatisfactory, because of the variety of opinions to be found on it; and we only desire to call the attention of the profession to the division of the courts upon the question. There are many plausible doctrines set out in the several decisions which maintain the opposite theory to the views here expressed, which we do not claim to have controverted in a clear and satisfactory manner. But taking all the circumstances into consideration, the common understanding of merchants, the character of the transaction and the necessities of commerce, we think that the able opinion of Senator Verplanck in the case of Allen v. Merchants' Bank (*supra*) is more consonant with the best established principles of law, and the habits and every-day experience of business men.

C. G. TIEDEMAN.

PAYMENT UNDER DURESS.

FELTON v. GREGORY.

Supreme Judicial Court of Massachusetts, November Term, 1880.

Where A found the pocket-book of B, which contained a large sum of money and memoranda by which the owner could be identified, and held it back for a reward, neglecting to put up the notices required by Gen. Stat., ch. 79, § 1; and after publication of an offer of reward, returned the pocket-book to B and received the reward; and a complaint for the violation of said statute was subsequently, with the concurrence of B, made against A, to which A pleaded guilty, whereupon the magistrate told him that "the laws made it explicit that he should return the money," and A then returned the sum received as a reward to B, who then paid him a smaller sum, and A said he was satisfied; in an action brought by A to recover the difference between the amount of the reward and said smaller sum, alleging it to have been paid under duress, it was *held*, that this evidence did not require a ruling as matter of law that the money was paid under duress.

MORTON, J., delivered the opinion of the court:

This case was tried in the Superior Court by the presiding justice without a jury, who found for the defendant. The only question presented by the bill of exceptions is, whether this finding was warranted by the evidence. It appeared that the plaintiff found a pocket-book containing a large sum of money belonging to the defendant. The pocket-book contained certain memoranda, with the defendant's name upon them, which the plaintiff saw when he first examined it, and which furnished him with reasonable means of knowing who the owner was. He made no attempt to find the owner, and neglected to put up notices as required by Gen. St., ch. 79, § 1, but, as he testified, "held back the pocket-book, without making any inquiries, for a large reward, knowing that a man who had lost so much money as that was able to pay a liberal reward." Four days afterwards he saw in a newspaper an offer of a reward of two hundred dollars for the return of the pocket-book and contents, and thereupon he called upon the defendant, delivered it to him, and received the reward of two hundred dollars. On the next day the defendant was informed by a police officer that the plaintiff had been guilty of a violation of the law, and the police officer, with the concurrence of the defendant, entered a complaint against the plaintiff for a violation of Gen. St., ch. 79, § 1. To this complaint the plaintiff pleaded guilty. The magistrate then said to him that the "law made it explicit that he should return the money," and the plaintiff then returned the two hundred dollars to the defendant, and the defendant paid him twenty dollars, and the plaintiff said he was satisfied. He afterwards brought this action to recover the one hundred and eighty dollars, on the ground that it was paid under duress.

Upon this evidence the presiding justice was not required to rule as matter of law, as requested by the plaintiff, that the money was paid under duress, and that the plaintiff was entitled to recover it back. The act of the plaintiff in concealing the fact that he had found the money, with the intent of obtaining a reward, was wrongful and fraudulent, if not felonious. Commonwealth v. Marin, 105 Mass. 163. He had no right under such circumstances to claim or retain the reward. His arrest was legal. Gen. Stat., ch. 79, § 1, ch. 176, § 2. Although he testified that he paid the money back because he supposed that, if he did not, he would be imprisoned, there was no evidence whatever of any threat of imprisonment by the defendant or any one. The presiding justice may properly have found upon the evidence that the plaintiff, finding himself detected in an offense, voluntarily paid the money back, and that the only coercion influencing his mind was the fear of the consequences of his own criminal act. If this can be held to be duress, then every thief who makes restitution of the stolen property, for the purpose of mitigating his sentence, would be entitled to recover it back on the ground of duress.

Exceptions overruled.

FEDERAL JURISDICTION — NATIONAL BANKS—CITIZENSHIP.

ST. LOUIS NATIONAL BANK v. ALLEN.

United States Circuit Court, District of Iowa.

1. A National bank, organized under the national banking law, is not authorized to sue, outside of the district in which it is located, in a circuit court of the United States, independently of any question of citizenship.

2. For the purposes of the jurisdiction of the Federal courts, a National bank is to be regarded as a citizen of the State in which it is established or located.

Hagerman, McCrary & Hagerman for plaintiff; *John N. Rogers*, for defendants.

McCRARY, Circuit Judge, delivered the opinion of the court:

The demurrer to the declaration in this case raises the question whether a National bank, organized under the act of Congress of June 3d, 1864, (13 Stat. 12) and located in St. Louis, Mo., is authorized to sue in this court a citizen of this State. In the discussion of the demurrer two questions have been suggested: 1. Whether a National bank is authorized to sue in any circuit court of the United States independently of any question of citizenship? and 2. Whether for the purposes of jurisdiction a National bank is to be regarded as a citizen of the State in which it is established or located?

1. Although upon the first question there may be room for doubt, we are inclined to answer it in the negative. The language of the statute is, that National banks shall have power "to sue and be sued, complain and defend in any court of law or equity as fully as natural persons." A fair construction of this provision would seem to go no further than to place these corporations on an equal footing with natural persons, and to confer upon them the right to sue and be sued in the Federal courts only to the same extent as natural persons, and under like circumstances and conditions. The first charter of the United States Bank, enacted in 1791, (1 Stat. 191) contained a provision which empowered the bank "to sue and be sued, etc., in any court of record or any other place whatsoever." This language is more comprehensive than the corresponding clause above quoted, from the present banking act, for it does not contain the words "as fully as natural persons," and yet it was construed by the Supreme Court as not broad enough to authorize suit by a bank in a circuit court of the United States. United States v. Devaugh, 5 Cr. 85. In that case the court held that the general words employed in the act, gave only a general capacity to sue, and not a particular privilege to sue in the courts of the United States. It was probably in view of this decision that Congress in the second bank charter, enacted in 1816, (3 Stat. 101), provided expressly that the bank should have power to sue and be sued "in all courts having competent jurisdiction, and in any circuit court of the United States." Upon the first question, therefore, our conclusion is that, as the right of a National bank to sue in this court is assimilated to the right of a natural person under the statutes to do so, it is a right which can be maintained only upon the ground of citizenship, since that is the test which must be applied to natural persons.

2. Can the plaintiff, a National bank, sue as a citizen of Missouri? By a long course of adjudications by the Supreme Court of the United States, it has been settled that a State corporation is, for jurisdictional purposes, to be regarded as a citizen of the State by whose laws it is created. These adjudications are, however, for the most part not placed upon the ground that a corporation can in any proper sense be a citizen within the meaning of that term as employed in the Constitution. On the contrary, it is repeatedly declared that a corporation can not possess the attributes of citizenship, and the rule is upheld upon the ground that a suit brought by or against a corporation is regarded as a suit brought by or against the stockholders of the corporation, and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. Insurance Co. v. French, 18 How., 404; Muller v. Dows, 95 U. S. 444; Covington Drawbridge Co. v. Shepherd, 2 How. 233.

The question for our consideration in this case is, does this rule apply to a National bank, created by act of Congress, but located and established within a particular State? It is clear that a corporation acquires no attribute of citizenship by being organized under, or created by, a State law, that it would not possess if created by a law of the United States. The difficulties in the way of permitting corporations to sue in the Federal courts on the ground of citizenship, apply with the same force whether a corporation derives its existence from a State or a National law. These difficulties have been overcome, with respect to State corporations, by adopting an arbitrary presumption as to the citizenship of the stockholders —a presumption no doubt often contrary to the fact, but justified, in the opinion of the Supreme Court, by considerations of great public importance. These considerations apply alike to all corporations located and doing business within a State, whether chartered under State or Federal authority. The policy of the adjudications referred to, is to treat corporations as citizens of the State in which they are located; the circumstance that they derive their existence from a State law makes no difference. If they are created by an act of Congress and located within a State, they become, within the reason of the rule, citizens of the State as much as State corporations. In delivering the opinion of the Supreme Court in Letson's Case (the leading case upon

this subject), Mr. Justice Wayne said: "When a corporation exercises its powers in the State which chartered it, that is its residence." 2 How. 497. An examination of the National bank act will clearly show that National banks are, in most respects, purely local institutions. They are distributed among the States and territories with due regard to their several wants, and by a fixed rule of apportionment. It is provided by the 6th section of the act of 1864, that the organization certificate of every National bank "shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the State, territory or district, and also the particular county and city, town or village." Numerous other provisions of the act refer to the associations to be organized under it as "located" within the States. They are also made subject to taxation under State law. It is far from correct to say that because they are organized under a law of the United States, they possess the same and equal rights in all the States. They must carry on their business of banking at the place named in their organization certificate, and nowhere else. For all practical purposes they exercise their functions only within the limits of the State in which they are located, and should one of them attempt to carry on business outside of those limits, it would find itself completely without authority. For these reasons we conclude that a National bank, being a corporation created by competent authority and located within a State, with power to transact business there, and not elsewhere, should be regarded, for all the purposes of the jurisdiction of the Federal courts, as on an equal footing with State corporations. This view is much strengthened by the provision of the bank act already quoted, which gives these corporations power to sue and be sued "in any court of law or equity as fully as natural persons." If this provision is construed as excluding all cases by or against a National bank which could not be brought by or against a natural person, it must also, we think, be construed as including all cases in which the court would have jurisdiction, if the bank were a natural person. In other words, Congress, by enacting this provision, must be supposed to have assumed that these corporations would be regarded, for jurisdictional purposes, as citizens of the States where located; for otherwise it would have been impossible to confer upon them the right to sue in all courts "as fully as natural persons." It must have been understood by Congress that they were, for jurisdictional purposes, to stand in the attitude, and possess the attributes of natural persons.

It is insinuated that jurisdiction in this case is by necessary implication excluded by the terms of section 629 of the Revised Statutes, which, among other things, provides that the circuit courts shall have original jurisdiction "of all suits by or against any banking association established in the district in which the court is held, under any law providing for National banking associations." But it is very clear that the effect of this provision is not to oust the court of jurisdiction under other provisions of the statutes of the United States. It gives to the circuit court jurisdiction in cases by or against National banks "established in the district in which the court is held," independently of any question of citizenship, and without reference to the subject-matter; but it does not prohibit the exercise of jurisdiction in any case which, under the bank act itself or under the judiciary act, or any of its amendments, might have been brought independently of that provision. There is nothing in the language in question to exclude jurisdiction in any other class of cases; it is permissive merely, and there is no necessary conflict between it and the provisions of law under which jurisdiction is claimed in the present case. Our attention has also been called to the provisions of sec. 640 of the Revised Statutes, by which National banks are excluded from the right conferred upon other Federal corporations, to remove suits brought against them in the State courts; but we are unable to see that this provision has any application to the question of the original jurisdiction of the circuit courts. The conclusions we have reached are supported by the following authorities, and we know of none to the contrary: Manufacturers' National Bank v. Baack, 8 Blatchf. 137; Cook v. State National Bank, 52 N. Y. 96 Davis v. Cook, 9 Nevada, 134; Dillon on Removal of Causes, 51. The demurrer to the petition is overruled. Love, District Judge, concurs.

VIOLATIONS OF THE INTERNAL REVENUE LAW — SUIT ON DISTILLER'S BOND — PENALTIES—COMPROMISE.

UNITED STATES v. CHOUTEAU.

Supreme Court of the United States, October Term, 1880.

1. Where, in a civil action against the sureties on a distiller's bond for certain penalties and forfeitures prescribed by law for the violation of the internal revenue laws of the United States, the answer averred that the loss of the tax by the United States was not consequent upon the violations of the law, which were alleged as breaches of the bond sued on, but was the result of a conspiracy between the officers appointed by law for the collection of the tax and the distiller, it was *held*, upon demurrer, that the answer stated a good defense to the action.

2. Where, in a civil action against the sureties on a distiller's bond for certain penalties and forfeitures prescribed by law for the violation of the internal revenue laws of the United States, the answer averred that the distiller, the principal on the bond sued on, had been indicted in the courts of the United States for the violations of the law which were alleged as breaches of the said bond, and that the proper officials of the United States to whom the prosecution for the said offenses was entrusted, had, under the authority of an act of Congress, accepted a certain sum of

money in full satisfaction, compromise and settlement of the indictment and prosecutions, which were thereupon dismissed and abandoned, it was *held*, upon demurrer, that the answer stated a good and sufficient defense to the action.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action upon a bond of a distiller, against the principal and sureties, and is founded upon sections 3303 and 3296 of the Revised Statutes. The bond is in the penal sum of $25,000, and, after reciting that the principal, Joseph G. Chouteau, intends, after the first day of May, 1874, to be engaged in the business of a distiller within the first collection district of Missouri, to wit, at Grand avenue and Main street, in the City of St. Louis, in that State, it is conditioned, among other things, that he "shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred, or fines imposed, on him for a violation of any of the said provisions."

Section 3303 is as follows: "Every person who makes or distils, or owns any still, boiler, or other vessel used for the purpose of distilling spirits, or who has such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or who uses any such still, boiler, or other vessel, shall, from day to day, make, or cause to be made, in a book or books, to be kept by him in such form as the commissioner of internal revenue may prescribe, a true and exact entry of the kind of materials, and the quantity in pounds, bushels or gallons, purchased by him for the production of spirits; from whom and when purchased, and by what conveyance delivered at said distillery; the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased; the amount paid for ice and water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches,—that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity and temperature at the hour of twelve meridian; also, of the time when any fermenting-tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold."

Section 3296 is as follows: "Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals, or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits, authorized by law, in any manner other than is provided by law, or conceals, or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years."

The complaint in the action, or petition as it is termed, contains eighty-four assignments of breaches of the conditions of the bond, forty-two of which, constituting the odd numbers, are founded upon section 3303, and forty-two, constituting the even numbers, are founded upon section 3296. The difference in the breaches assigned in each class is in respect to the day on which the act constituting the breach is alleged to have been done, commencing on the 2d day of May, and ending on the 15th day of August, 1874. The same breach of duty is charged to have been committed on forty-two different days.

The breach stated in each of the assignments designatad by odd numbers is, that the distiller omitted to make in a book he was required by law to keep, a true and exact entry of the kind and quantity of materials used by him in the production of distilled spirits; that he produced from the grain used a large quantity of spirits, and "that by means of the said omission to make said entry in said book as aforesaid," he "was enabled to defraud, and did defraud the United States of the internal revenue tax" then imposed by law on the spirits, whereby the United States were damaged in the sum of $2,100.

To this breach in the various assignments the defendants answer, and deny that by reason of the alleged omission of the distiller to make proper entries in the distiller's book mentioned, he was enabled to defraud and did defraud the United States of the tax on distilled spirits produced at his distillery or any part of the tax; and state, that prior to any of the acts complained of, the distiller combined, confederated, and conspired with certain designated revenue officers and agents, and other distillers and rectifiers, to defraud the United States of the tax on distilled spirits produced at various distilleries within the first collection district of Missouri; that in furtherance of this conspiracy and to accomplish its purpose, the parties concerned in it committed various violations of the revenue laws, and among other things,

they removed and aided in the removal of distilled spirits from the distilleries without having first paid the tax on them; they re-used upon packages paid and warehouse stamps which had been previously used; they gave and received bribes, and made, and connived at making, false and fraudulent reports to the collector of internal revenue within the district of the quantities of spirits produced upon which taxes had become due; that the distiller, by reason of his participation in this conspiracy, was enabled, if at all, to defraud the United States of the tax on distilled spirits produced at his distillery within the period covered by his bond; that the internal revenue officers charged with the execution and enforcement of the internal revenue laws had no occasion to have recourse to the distiller's book and the storekeeper's record kept at the distillery, and did not have recourse to them, or examine them to obtain information touching the quantities of grain used and the number of gallons produced at the distillery; and that it was by reason of the organization and execution of this conspiracy, irrespective of the omission to make the entries mentioned, that the conspirators were enabled to defraud the United States of the tax on spirits produced at the distillery.

The breach stated in each of the assignments designated by even numbers, is, that the distiller removed spirits produced at his distillery to a place other than the distillery warehouse, without the internal revenue tax imposed thereon being first paid, thereby incurring a penalty of $2,800, which sum he has not paid.

To this breach in the various assignments, the defendants answer that the United States ought not to maintain their action for the penalty denounced in sec. 3,296; for, at the November term, 1875, in the District Court of the United States for the Eastern District of Missouri, two bills of indictment were found against Chouteau, the distiller, (the principal upon the bond sued upon), one of which contained counts founded upon that section, alleging the removal by him and his aiding and conniving at the removal of distilled spirits from his distillery to a place unknown, upon which spirits the revenue tax was imposed and had not been paid, the other counts being founded upon secs. 3,281 and 5,440 of the Revised Statutes; that afterwards, with the advice and consent of the Secretary of the Treasury and upon the recommendation of the Attorney-General, the commissioner of internal revenue accepted from the distiller $1,000 in full satisfaction, compromise, and settlement of the indictment and prosecutions, which were thereupon dismissed and abandoned.

And the defendants further answering, state "that the alleged removals of distilled spirits set forth in the various assignments of breaches now answered, are the same removals recited in the said indictment; that all of the said removals of spirits complained of in plaintiff's petition might have been established, if said allegations be true, under the said indictments, either upon those counts based upon sec. 3,296, or that count based upon sec. 3,281; that all of the evidence which would be necessary to establish, and competent under the various assignments of breaches in plaintiff's petition, would also be competent under, and would tend to establish, the allegations of said indictments; that the various assignments of breaches in plaintiff's petition relate to the same subject-matter, and are based upon the same transaction as the various allegations in said indictments contained, so far as they relate to alleged offenses under secs. 3,296 and 3,281 and 5,440, and that at the time when the said indictments were presented to said grand jury, and at the time when the said indictments were considered by said grand jury, all of the facts which would be competent to sustain the allegations of plaintiff's petition were known to, and within the possession of, the representative of the United States."

To the answer of the defendants the United States demurred, but the demurrer was overruled, and they declining to plead further, judgment was entered thereon in favor of the defendants, and the case is brought here on writ of error.

Ths Solicitor-General for the United States; *Chester H. Krum* for the defendants.

Mr. Justice FIELD, delivered the opinion of the court:

As seen by the statement of the case, each breach of the condition of the bond in suit, of the class designated by even numbers, consists in the omission of the distiller to make the required entries in the book provided in section 3.303. The petition alleges that, by "means of said omission," the distiller was enabled to defraud, and did defraud, the United States of the tax imposed by law upon the spirits produced at his distillery. The answer denies this allegation, and avers that whatever fraud was committed upon the United States, was effected through other means. The demurrer admits that averment to be true, and the question is thus presented, whether a party seeking damages for a specified breach of duty is entitled to judgment in his favor, when admitting on the record that whatever damages he may have sustained, resulted from other causes.

The case is not brought for any tax alleged to be due to the United States, which they would be entitled to recover, whatever the cause of its non-payment. In such a case it would be of no consequence whether the cause assigned for the default of the party was the true one or not; the obligation to the government would be the same. Here a specific omission of duty on the part of the distiller is alleged, for which it is sought to charge both him and his sureties on their bond. Their liability is only to the extent of the damage sustained. If no damage resulted to the United States from the omission stated, none can be obtained either against him or his sureties. The law does not affix any specific penalty which may be recovered for the omission. If, therefore, the allegations of the petition were simply traversed,

the government would be compelled to prove, not only the omission complained of, but that by means of it the tax on the spirits produced was lost, which is the damage alleged. It would not be sufficient to show that by other omissions of duty the government was thus defrauded, for that would be to change the entire ground of the action, the specific gravamen of the complaint.

Now, the demurrer admits that the ground of complaint—the specific breach of duty stated—did not cause the damage charged, but that whatever damage was sustained by the United States, was effected by other means. Therefore the action, so far as damages are claimed for the particular omission of duty mentioned, must fail.

It is true that the breaches of duty, which are stated by the defendants in their answer, as the means by which the United States were defrauded, are a series of stupendous frauds, for which the guilty parties deserve severe punishment; still they were none the less available as a defense to an action charging to other causes the damages which they produced. It is certainly one way of defending against the charge of a wrongful act for which damages are sought, to show that, notwithstanding the wrong committed, the damages resulted from other causes, however objectionable a pleading might be with averments to that effect, instead of a distinct traverse of the allegations of the complaint. If, for example, a party should charge another with inflicting upon his person a wound by which he lost an arm, it would be a good defense to show that the loss resulted from unskillful medical treatment or neglect, and not from the wound inflicted. So here, it is enough for the sureties to show that the loss to the government was produced by other means than the particular breach of duty by their principal, of which the government complains. It is of no consequence to them, so far as the present action is concerned, how many other sins of omission or commission he may have committed, if they can show that the particular damage claimed, was not the result of the one charged.

As to the breaches of duty in the assignments of the class designated by even numbers, we are of opinion that the compromise with the government pleaded, is a complete defense against a recovery of the penalty claimed. Each breach alleged consists in the removal by the distiller of spirits produced at his distillery to a place other than the distillery warehouse, without first paying the tax imposed thereon. The penalty prescribed for this offense was intended as part punishment for it, and may be enforced, equally as the additional fine and imprisonment, by criminal prosecution. It was not intended in any sense as a substitute for the tax required, or as any abatement of it when recovered. This is evident from the fact that it may be applied to those who have aided or abetted in the removal, whether the distiller or one having no interest in the spirits. So, too, the payment of the tax may be made after the removal, and yet the penalty not be discharged; it could still be imposed upon the offending party.

It may be questioned whether the only mode for a recovery of the penalty is not by indictment; but assuming that it may be recovered in a civil action, the compromise pleaded covers the penalties here claimed. Two indictments have been found against the distiller, one of which contains counts for the specific offenses, which constitute the whole ground and cause of the present action. Under the authority of an act of Congress, a compromise with the government was effected, by which a specific sum was paid by him, and received by the government, "in full satisfaction, compromise and settlement of said indictments and prosecutions;" which were accordingly dismissed and abandoned. That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offenses charged and any further punishment for them. The answer avers that the removals of distilled spirits set forth in the assignment of breaches of the condition of the bond are the same removals recited in the indictments; and that all the evidence necessary to establish the breaches assigned would have been necessary and competent under the indictments. The two proceedings, the civil action and the criminal prosecution, so far as they relate to offenses under section 3,296, are based upon the same transactions.

The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the Government, under the sanction of an act of Congress, of prosecutions based upon the same offense, and designed to secure the same penalty.

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings, as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise, would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.

Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must, on principle, have the same effect. The government, through its appropriate officers, has indicated, under the

authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication, and satisfied the government. It would, therefore, be at variance with right and justice, to exact in a new form of action the same penalty. For, as it was justly said by this court in *ex parte* Lange, speaking through Mr. Justice Miller: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law." 18 Wallace, 168.

Judgment affirmed.

NOTE.—The principal case is deserving of notice as clearly affirming United States v. McKee, 4 Dillon, 128.

I. The penalty provided by section 3296 was intended to be, and is a mere punishment. This is demonstrated by the fact that the recovery of the penalty is not made, in any sense, to work an abatement of the tax. Furthermore, the section is not limited in its application to those from whom the tax is due, by reason of their production of the spirits. It covers every one, be he distiller or not, who violates its provisions. And then, also, the distiller may unlawfully remove the spirits before the payment of the tax, and may afterwards pay such tax. His payment after removal can not operate to abate the penalty incurred by his violation of the statute, evidenced by the unlawful removal. All of the punishment contemplated by the section can be inflicted by indictment. The statute is a penal statute. No provision is made for the enforcement of the penalty. Hence it may be enforced by indictment. Callum v. Swett, 1 Mete. 232, 235; State v. Meyer, 1 Speers, 305. As before indicated, the term penalty is inseparable from the idea of punishment. There is on the part of every citizen an implied obligation that he will obey the laws of his country. But, in the event of an infraction of law upon the part of the citizen, he becomes liable to such penalty as may be denounced by law, not in the sense of having become a debtor to the government, but as having exposed himself to punishment. And, in general, though a penalty may be recoverable in a civil action, yet it is enforcible not the less as a punisbment. Whether it be a pecuniary penalty or otherwise, its enforcement is no less a mode of punishment. The proposition becomes even more forcible, when the occasion for the enforcement of a penalty arises from an attempt to deprive the government of its legitimate revenue. The Internal Revenue laws of the United States have imposed upon a particular product a heavy tax, and have provided means and methods for the enforcement of such tax. These laws have pointed out the circumstances under which the production of distilled spirits shall be lawful; have provided at what time the tax shall attach and become a lien; have directed who shall be primarily liable for the payment of the tax, and have denounced severe penalties for evasions and violations of their various requirements. But all through these laws is to be found a clear distinction between the obligation to pay the tax and the punishment imposed for the evasion or attempted evasion of payment. Before the revision, the provision in relation to the tax was not materially different from that found in sec. 3251: "There shall be levied and collected on all distilled spirits, on which the tax prescribed by law has not been paid, a tax of seventy cents on each proof gallon, to be paid by the distiller, owner, or person having possession thereof, before removal from the distillery warehouse. * * Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom;" and the statute then proceeds to create a lien for the tax upon the spirits, the apparatus, and the distillery premises. Sec. 3253 provides that the tax upon any distilled spirits removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall at any time, when knowledge of such fact is obtained by the commissioner of internal revenue, be assessed by him upon the distiller of the same, and farther provision is made for the collection by distraint of the tax so assessed. The distiller is required by sec. 3260 to give bond, conditioned for the faithful performance of provisions of law relative to his duties and business. Sec. 3309 requires the commissioner of internal revenue, upon the receipt of the distiller's return for each month, to inquire whether the distiller has accounted for all the grain used and for all spirits produced during the month. If the whole quantity produced has been accounted for, but if such quantity is less than eight per centum of the producing capacity of the distillery, the commissioner is to make an assessment for such deficiency at the rate of seventy cents per proof gallon. If the commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced, and make an assessment for the difference between the quantity reported and the quantity shown to have been actually produced. Aside from sec. 3294, which provides for the payment of the tax to the collector, upon an entry for withdrawal from warehouse, the foregoing sections are believed to be all of the provisions which look to the enforcement of the tax as such. It will be observed that, whether the sum collectable from the distiller be upon an entry for withdrawal of spirits actually produced and accounted for, or upon an assessment for spirits produced and not accounted for, the sum so collectable is the amount of the tax and no more. The various sections contemplate the realization of the sum due by way of tax from the distiller. They do not provide for the enforcement of a penalty—measuring it by the amount of, or twice the amount of, the tax; but they call for and secure the collection of the amount of the tax alone. The distiller is the debtor. He is primarily liable under the statute at once upon the production of the spirits. It is immaterial whether he accounts for all spirits or knowingly fails to do so. Upon the production of the spirits, whether accounted for or not, the distiller, by operation of law, becomes a debtor to the United States to the full amount of the tax. And, as before shown, the statute seeks to enforce this debt alone. But the sections of the statute designed to inflict a punishment for violations of law do not contemplate the collection of the tax from the offender. In some instances the penalty is measured

by the amount of the tax, but nothing more. Sec. 3256 provides that whenever any person evades, or attempts to evade the payment, of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded, or attempted to be evaded. By sec. 3257, whenever any distiller defrauds or attempts to defraud the United States of the tax on spirits distilled by him, he forfeits the distillery and apparatus used by him, and all distilled spirits and raw materials for the production of spirits found upon the premises. By sec. 3284, every distiller or person employed in any distillery, who, in the absence of the storekeeper, uses, or causes or permits to be used, any material for the purpose of making mash, wort, or beer, or for the production of spirits, or removes any spirits, shall forfeit and pay double the amount of taxes on the spirits so produced, distilled, or removed. Under these sections the pecuniary penalty is, in some instances, measured by the amount of the tax, but the enforcement of the penalty has, and can have, no relation to the collection of the tax. Under sec. 3284, for instance, the amount forfeited by the distiller is not so forfeited because he has produced spirits upon which the tax is unpaid, but because he has unlawfully used materials or unlawfully removed spirits. The United States can have an assessment for spirits produced and unaccounted for—collect the amount so assessed from the distiller, and punish him by the enforcement of the penalty in double the amount of the tax.

There are other considerations worthy of notice. Suppose, prior to the repeal of the statute giving to informers moieties under the Internal Revenue laws, a person had given information as to the removal of spirits without the payment of the tax, which led to a suit for the penalty, and that in such suit judgment was recovered, there can be no doubt that in such case the informer would be entitled to his moiety if he had taken the necessary steps to secure his claim. But suppose that upon the very same evidence the commissioner had based an assessment for the tax, would the informer be heard for one moment upon a claim for a moiety of such tax? That he would not, is evident. The case of McLane v. United States, 6 Pet. 404, is analogous to the principal case. There a remission was directed by Congress on payment of the duties which would have been payable on the goods, if they had been lawfully imported; that is, upon payment of double duties imposed by the act of July 1, 1812. In a contest as to the claim of the collector to a moiety in the sum paid to secure the remission, it was argued on the part of the United States that double duties were imposed as upon a lawful importation, or at least that so much of the duties demanded as were equal to single duties ought to be considered as having been received as such by the government. But the court held differently. The double duties were referred to as a mere mode of ascertaining the amount to be reserved out of the forfeiture, and not as a declaration of intention on the part of the government that they were to be received as legal duties due upon a legal importation. The duties were reserved as a whole, and not in moieties. The whole must have been treated as received by way of a reservation by way of forfeiture. The act referred to the double duties as a mere mode of ascertaining the amount, and it was undistinguishable from the case of a reservation of a gross sum.

But the precise question here discussed was determined by Mr. Justice Miller. For, in United States v. Ulrici, 3 Dillon, 533, it was argued in behalf of the defendant, that because the act of 1875 provided a different punishment from that under which the indictments had been formed, therefore the earlier act was repealed, and did not fall within the saving clause of sec. 13 of the Revised Statutes, which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, because the words penalty, forfeiture or liability are not equivalent to the term punishment. But the learned justice disposed of this argument in the following language: "Now the counsel for the defendant argues that neither the word 'penalty,' 'forfeiture,' nor 'liability,' is equivalent to the word 'punishment,' and therefore that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term 'penalty,' and this he insists means only that which can be enforced by a civil action, or by the term 'liability,' which he says means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by Congress to include all forms of punishment for crime; and, as strong evidence of this view, I found during the progress of the argument and called the attention of the counsel to a section which prescribed fine and imprisonment for two years, wherein Congress used the words, 'shall be liable to a penalty of not less than one thousand dollars, * * * * and to imprisonment not more than two years.' Moreover, any man using common language might say, and very properly, that Congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding." The penalty denounced by sec. 3296 is, therefore, to be regarded as part of the punishment of the offense. The tax, as such, is not recoverable under the section. The distiller who produces the spirits is not liable for the tax under this section. If sued at all, he must be sued as for the penalty, and under common-law methods of procedure the declaration or indictment must conclude *contra formam statuti*.

II. The compromise effected by the principal operated to protect him and his sureties from the consequences of subsequent proceedings based upon the same facts, as fully as a former conviction or acquittal. The principal had unquestionably been punished for an offense. The plaintiff in error was content to receive a specific penalty as such punishment. The indictments compromised covered the same ground; were based upon the same facts as the present assignments of breaches. One of them, at least, was found for the enforcement of the same penalty for which the present action is sought to be maintained. The removal of spirits, and the fraudulent management of the distillery were admitted to have been mere incidents to a conspiracy to defraud the United States of the tax on spirits produced at such distillery. To that conspiracy the principal in the obligation sued on was a moving, active party. Sec. 3229 provides: "The commissioner of internal revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws, instead of commencing suit thereon; and with the advice and consent of the said secretary, and the recommendation of the attorney-general, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case, there shall be placed on file, in the office of the commissioner, the opinion of the solicitor of internal revenue, or of the officer acting as such, with the reasons therefor, with a statement of the amount of tax assessed,

the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person gainst whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise." This section illustrates the distinction between the tax and penalties incident to its collection. No compromise was made of the taxes. The suit was not brought to recover such taxes. But the penalty was compromised. The principal was punished by the payment of the sum demanded as a specific penalty. The suit contemplated a second punishment by enforcing the same penalty. Not this alone; but the plaintiff sought to enforce a penalty for acts done in violation of sec. 3296, when they were admitted by the demurrer to have been part and parcel of the more general offense, under 5440, and when the very indictment for conspiracy, of which the removal of spirits was a mere incident, had been fully and finally compromised.

The crime of conspiracy, and the offense under sec. 3296, are both misdemeanors. But where two offenses of the same degree happen to have been committed to accomplish a purpose common to both—the one as an incident to the other—a compromise or statutory conviction of one must inevitably operate as a bar to a prosecution for the other. State v. Cooper, 1 Green, 375. The purpose of the conspiracy was to defraud the United States of the tax on distilled spirits. The removal of spirits without the payment of the tax was had with the same purpose, and was necessary to the execution of the conspiracy. It was not necessary to the existence of the conspiracy as an offense. But when done in furtherance of the conspiracy, the removal became inseparable as an incident to such conspiracy. How can it be otherwise regarded? Is the general to be considered more limited in its effects than the particular offense? Is a partnership in crime, having in view the perpetration of fraud, of less significance than an individual offense committed to effect the purposes of such partnership? The consummated conspiracy, and the act done in furtherance and to effect the purpose of the conspiracy, are part and parcel of the same offense. Commonwealth v. Kingsbury, 5 Mass. 106. Take any case of the actual defrauding of the United States of the tax on distilled spirits by their removal from the distillery without the payment of the tax, such removal being had by two or more persons, one aiding and abetting the other, and there must needs have been a conspiracy at some time prior to the commission of the act. It is impossible to conceive that this can be otherwise. "It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively and tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed." United States v. Babcock, 3 Dill. 585.

It may be conceded that there is no necessary connection, in the abstract, between secs. 5440 and 3296. A person may be rendered liable under both sections, where the offenses relate to distinct matters and have in view distinct purposes. But, under the defense set up in the answer, the relations between the sections was clearly shown. In the indictments there set out, the relation between the sections, as determined by the facts alleged by the defendant in error, was clearly established. The purpose of the conspiracy was to defraud the United States of the tax on distilled spirits. The acts done in furtherance of the conspiracy were removals of spirits without the payment of the tax. The conspiracy was consummated by acts whose very purpose was to work the same fraud whose perpetration was the object of the conspiracy. To make the offenses the same, the two indictments need not be drawn exactly in the same language. To establish the identity of the offenses, evidence outside of the record is admissible. In fact, where the record of the former indictment has been destroyed, evidence as to the identity of the offense is competent, and the plea of former acquittal or conviction need not conclude *prout patet per recordum*.

In the case of the principal under the indictment for conspiracy, evidence to the effect that he and others had removed spirits from the distilleries without the payment of the tax, would not only have been competent, but would have been alone sufficient to have sustained the charge. It was a conspiracy to defraud the United States of the tax on distilled spirits. The effect of repeated removals of spirits without the payment of the tax would be to defraud the United States of such tax. To have participated in many of such unlawful removals with various parties, would have shown a purpose in common with such parties, namely, to defraud the United States of the tax. Supplying the corrupt motive, the crime of conspiracy would be complete. "The true test, by which the question, whether such a plea is sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first." Price v. State, 19 Ohio, 423.

At the March term, 1854, of the District Court of the United States for the District of Massachusetts, Lindsey Nickerson was indicted for perjury. The indictment charged, that in order to obtain the allowance of bounty-money, on account of the employment of a vessel in the cod-fishery, of which vessel he was the agent, he made oath before the collector of the District of Barnstable, where the vessel was enrolled and licensed, that a certain paper, produced by him to the collector, was the original agreement made with the fishermen employed on board the vessel during the fishing season then last past; that three-fourths of the crew so employed were citizens of the United States, or not subjects of any foreign prince or State; and that these statements were false, and known to the defendant to be so when he made the oath. Nickerson was tried and acquitted. At the May term, 1854, of the Circuit Court for the District of Massachusetts, Nickerson was again indicted, and to this last indictment pleaded specially his former acquittal, and the plea was demurred to. The judges were divided in opinion, and the matter was certified to the Supreme Court. The court held the plea to be good, for the reasons: 1. That the evidence, competent and essential to support the indictment in the circuit court, might have been admitted in support of the former indictment in the district court. 2. That the oath alleged in the former indictment was the same as that alleged in the present indictment. 3. That the same occasion for making the

oath was alleged in both indictments; that occasion being to obtain an allowance of money from the United States, as bounty, on account of the employment of a vessel called the Silver Spring, in the codfishery, during the season then last past. United States v. Nickerson, 17 How. 204.

At the September term, 1875, of the Circuit Court for the Eastern District of Missouri, William McKee was convicted of conspiracy with various distillers to defraud the United States of the tax on distilled spirits. He was afterwards sued for penalties, under sec. 3296, for having aided and abetted the same distillers in the removal of distilled spirits from their respective distilleries without the payment of the tax. He pleaded his former conviction. His answer stated that all of the evidence which could be pertinent to the civil action was either heard upon the trial of the indictment, or might then have been heard; that the same evidence which could be competent in the civil action was either offered and heard at the trial under the indictment, or might have been heard at such trial; that the various matters covered by the civil action were either heard under the indictment, or might have been heard thereunder; and that the various matters sought to be made the grounds of recovery in the civil action indictment were, or might have been, made the means of establishing both the unlawful conspiracy and confederation against the United States, the connection of defendant with such conspiracy, and also the various acts charged in the civil action. The occasions were the same, the objects the same, the means of accomplishing the unlawful purposes substantially the same. And the evidence which would sustain the civil action against the defendant, would have established his participation in a deliberate conspiracy to defraud the United States of the tax on distilled spirits. It was held on demurrer to this answer, "That if the specific acts of removal on which this suit is brought, are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averment that they are the same." United States v. McKee, 4 Dill. 128-130. For the offense under sec. 3296, directed to the accomplishment of the same purpose as that of the offense under sec. 5440, and contemporaneous with it, is nothing but a conspiracy within a conspiracy. "It is not necessary, in order to render a party an aider and abetter, that he should be actually present; it is sufficient if he was in such a situation as to be able readily to come to the assistance of his companions, the knowledge of which was calculated to give additional confidence to them, and to make no difference who strikes the blow—the blow of one is the blow of all." Green v. State, 28 Mo. 392. "Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators." United States v. Babcock, 3 Dill. 586. The crime under sec. 5440 is the broader, more comprehensive crime; but the answer made the offense under sec. 3296 included within such crime as its necessary incident. If A be indicted for being a common seller of liquor—an offense made up of a combination of specific sales—and convicted, he can not afterwards be tried for a single act of selling during the period covered by the first indictment. "If the government see fit to go for the offense of being a 'common seller,' and the respondent is adjudged guilty, it must, in a certain sense, be considered as a merger of all the distinct acts of sale up to the filing of the complaint, and the respondent can be punished but for one offense." State v. Nutt, 28 Vt. 598.

Where the same blow wounded two men, a conviction for the assault and battery charged to have been committed on one of them was held to be a bar to an indictment for the assault as having been committed on the other. State v. Damon, 2 Tyler, 387.

The having in one's possession several forged bank-notes, of different banks, at one time, with intent to pass them, and thereby to defraud the person who shall take them, constitutes but one offense. And if there be several informations, charging that the several bills so held in possession were held with intent to defraud the several banks by which they were issued, as well as the person who should take them, there is still but one offense charged. In this case, the intent charged was to defraud the two different banks specified, namely, the Troy Bank and the Mechanics' Bank, as well as the persons to whom the notes might be put off. It was insisted on the part of the State, that distinct offenses were stated. But the court say: "Here the same evidence of possession exists in both cases; the same general attempt to defraud the persons to whom they may be passed. The act of possessing the several notes, then, must be one and the same offense, as much as the act of stealing a number of articles at the same time and place." State v. Denning, 7 Conn. 417.

And, in an action for the penalty for insuring tickets in a lottery, where ten tickets were insured at one and the same time, Lord Kenyon held, that but one penalty could be recovered. Holland *qui tam* v. Driffin, Peake's Ca. 58.

Where the legal bar has once attached, the government can not avoid it by varying the form of the charge in a new accusation; if the first indictment or information were such that the accused might have been convicted under it on proof of the facts, by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second. Cooley's Const. Lim. (3d ed.) 328. The law is well settled, that upon an indictment for petit treason, in a servant's killing his master, for example, an acquittal on conviction of murder for the same killing is a good bar. 2 Hale's P. C. 246. The offense of a nuisance, under sec. 1654 of the revision, is as complete by the doing of either of the acts prohibited by sections 1561, 1562 and 1563, as by the doing of all. Hence, an indictment charging the offense to have been committed at a particular time and place, by keeping intoxicating liquor with intent to sell the same contrary to law, is the same accusation as that contained in another indictment, charging the offense to have been committed at the same time and place, by selling intoxicating liquor contrary to law. And a conviction under one indictment would be a bar to a prosecution under the other. "If there was in fact but one offense, one conviction should suffice. The law abhors even the splitting of civil actions, and if a party sues for and recovers a part of a continuous account, such recovery is a bar to a second suit, though for another part of the same account; and *a fortiori*, such splitting of actions should not be allowed in criminal proceedings." The State v. Layton, 25 Iowa, 193.

Two bills of indictment were found against a prisoner at the same term—one for burglary and larceny, the other for robbery—and both indictments charged the same felonious taking of the same goods. The prisoner was tried on the first indictment, and found

guilty of the larceny, and not guilty of the burglary. It was held that he could not be put on trial under the second indictment, because it would conflict with the principle, "that no one shall be twice put on trial for the same crime." State v. Lewis, 2 Hawks, 98. The great object in respect to that class of pleas in bar, to which this belongs, is to see, in the first place, whether the former and the present declaration or indictment are of sufficient capacity to let in the same cause of action or offense under each. If so, the former trial is always *prima facie* a bar. The parties should, however, be allowed free scope for inquiry as to what was in truth the substantial matter before litigated. If that were the same, and the case were tried upon its merits, the decision becomes conclusive, especially in a criminal proceeding. People v. McGowan, 17 Wend. 389. A defendant can not be convicted and punished for two distinct felonies growing out of the same identical act, and when one is a necessary incident in the other, and the State has selected and prosecuted one to conviction. If in a civil case the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the government shall not oppress the citizen by unnecessary prosecution. State v. Cooper, 1 Green, 361. "Where concert," says Chief Justice Gibson, "is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major can not be indicted for the minor. If it were an integral offense, and not an integral part of one, he might otherwise be convicted of it, though he had before been convicted of the whole." Shannon v. Commonwealth, 2 Harris, 227. See, also, United States v. Miner, 11 Blatchf. 511; State v. Williams, 10 Humph. 101; State v. Risher, 1 Richardson; 219; Commonwealth v. Squire, 1 Metc. 258. This principle should control in case of a compromise. "The prosecutor may carve as large an offense out of the transaction as he can, but he must carve but once." 1 Bishop's Cr. Law, § 1060. "If there is anything settled in the jurisprudence of England and America," said Mr. Justice Miller, in *ex parte* Lange (18 Wallace, 168), "it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of common law. * * * * *Nemo debet bis puniri pro uno delicto.* * * * * If we reflect that at the time this maxim came into existence, almost every offense was punished with death, or other punishment touching the person, and these pleas are now held valid in felonies, minor crimes and misdemeanors alike, and on the difficulty of deciding when a statute, under modern systems, does or does not describe a felony, when it defines and punishes one offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence." If the compromise under 5440 and 3296 was no bar to the action under 3296, then a judgment under the latter section would constitute no defense against an action under 3256. And the extraordinary spectacle might have been presented of a trial had, in which the unlawful removal of one hundred thousand gallons of spirits was shown, and a recovery had to the amount of the full penalty of the bond—double the amount of the tax; the recovery of such judgment pleaded in bar to a second action based upon an alleged evasion, or attempted evasion, of the same tax on the same spirits; the plea held bad, and judgment recovered anew in double the amount of the tax! And it would probably have been gravely contended, on the part of the government, that such a course of procedure would be justifiable, because the offenses which gave the cause of action are distinct and created by different sections of the statute. But it is to the facts that the court will look, and not to mere statutory divisions. "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual, which have received for ages the sanction of the jurist and the statesman; and in such cases, no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." *Ex parte* Lange, 18 Wall. 168.

That a single or entire demand can not be split up so as to constitute the basis of more than one suit, and that the recovery upon any part of such demand merges the whole, is said by Mr. Freeman to be undisputed. Freeman on Judgments, sec. 238; the case of Wagner v. Jacoby, 26 Mo. 532, is to the same effect. In Miller v. Covert, 1 Wend, 487, it is decided that when a person brings an action for a part only of an entire and indivisible demand, and obtains judgment in such action, he can not subsequently avail himself of the residue by way of set-off in an action against him by the opposite party. This rule of law is said by a learned judge to be founded on two maxims, as old as the law itself: "*Nemo debet bis vexari pro una et eadem causa*" and "*Expedit reipublicæ ut sit finis litium.*" This rule applies as well when the entire claim could not have been recovered in the first suit, as when it could have been so recovered, (Fireman's Insurance Co. v. Cochran, 27 Ala. 238), and is equally true whether the action is based upon a contract or a tort. Secor v. Sturgis, 16 N. Y. 554.

The rule of law on this subject is very clearly settled, but it is a matter of some difficulty to determine what facts constitute an entire or single demand. In Secor v. Sturgis, 16 N. Y. 558, it is said by Strong, J., that—"The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former immediately arise out of one or the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests on one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action." The averments of the answer in the principal case make the indictments compromised and the present suit cover and relate to one and the same transaction. "The government, through its appropriate officer, has indicated under the authority of an act of Congress the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty."

CHESTER H. KRUM.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

COUNTY BONDS—MUNICIPAL LIABILITY—REFUSAL TO ISSUE BONDS VOTED—REPEAL OF ENABLING STATUTE.—The legislature of Wisconsin, by an act approved April 1, 1864, authorized certain counties to vote upon "railroad aid" to a contemplated railroad in that State; and if the result of the vote was in favor of it, to issue bonds, etc. In November, 1867, the County of Eau Claire, acting under this statute, voted in favor of "aid" to the railroad in question to the amount of $50,000. Prior to March 10, 1870, the road was completed through that county; about March 15, 1870, the railroad company demanded from the board of supervisors of the county, the bonds which had been voted, and the board refused to issue them because, they said, the highest courts in the State had decided that a tax to pay such bonds could not be legally levied, and that it would be wrong to issue bonds which must needs be repudiated. In 1872, the act of 1864 authorizing the issue of bonds by the County of Eau Claire was repealed; and in 1875 the railroad company assigned its demand against the county to Wadsworth, who filed a bill in equity to compel the execution and delivery of the bonds to him. A demurrer to this bill was sustained and judgment entered for defendants. Upon this state of facts, it was *held*, that there was no binding agreement or contract between the railway company and the county, by which the latter became bound to execute and deliver the bonds in question; that the act of April 1, 1864, did not make it imperative upon the supervisors to issue the bonds, being an enabling statute authorizing, but not absolutely commanding them to do so. Besides this, the court *held*, upon the authority of Aspinwall v. Commissioners, etc., 22 How. 364, that before the county came under any legal obligation to issue the bonds, the legislature could, as it did, repeal the statute of April 1, 1864, thereby withdrawing from the supervisors all authority in the premises. Affirmed. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Opinion by Mr. Justice HARLAN.—*Wadsworth v. Eau Claire County.*

INTERNAL REVENUE—STAMPS.—Goldback, a manufacturer of friction matches, was sued together with his sureties on his bond for the amount of proprietary stamps issued to him to be used in his business. The face value of the stamps for which he was indebted was $3369.00 but deducting the allowance for discount or commission to which he was entitled, the amount due was $3062.72. This sum Goldback paid pending the suit, to-wit, on November 20, 1876. The case was submitted to the court below, the question in issue being, whether under section 3624 of the Revised Statutes, Goldback was entitled to any discount or commission at all on the amount of his stamps. Judgment was rendered on this issue in favor of defendants. Upon writ of error it was *held*, that this case did not fall under section 3624 of the Revised Statutes. That section provides that persons accountable for public money, being in default and sued for the balances they may owe the government, shall, in every instance where suit is commenced and judgment obtained, forfeit their commissions and become liable for six per cent. interest. The defendant, Goldback, was not accountable for any public money, he was simply a debtor, and his so-called commissions were merely the discount allowed on account of the quantity of stamps purchased. He had no money in his hands belonging to the United States. Affirmed. In error to the Circuit Court of the United States for the Eastern District of Virginia. Opinion by Mr. Chief Justice WAITE. —*United States v. Goldback.*

ASSIGNMENT—EVIDENCE.—Myers and Greene were heavily indebted to Tate, and sought to pay by assigning to him a bond which they held upon George & Brothers and a judgment they were about to recover against that firm. The assignment was as follows: "I, William Greene, in consideration of the sum of $8,509 to me in hand paid by Samuel W. Tate * * * * do hereby assign to said Tate the within instrument, and all my interests in the covenants and agreements therein contained * * * * and I hereby assign and convey to and for the benefit of said Tate all my right and interest in a certain suit now pending * * * * wherein I, William Greene, and J. J. Myers are plaintiffs, and M. B. George & Brothers are defendants," etc. The *testatum* clause is: "Witness my hand and seal this 1st day of November, A. D. 1872. Myers & Greene by Wm. Greene." Tate showed this assignment to Myers, who said it was "all right," and Tate thereupon surrendered to Myers the notes of Myers and Greene to the amount of the claim against George & Brothers. The bond which was assigned was given to prevent the execution of an attachment, and was conditioned for the payment of such judgment as Myers and Greene might recover against George & Brothers. Upon this state of facts it was *held*, that it was the intention of both parties that the bond should be transferred to Tate, and that intent was made effectual notwithstanding the unskilfulness of the draftsman of the instrument. The assignment could have been made by one of the partners, and he could have made it by parol. Jones v. Guaranty Co., 101 U. S. 631. The signature of the firm name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly. It was further *held*, that proof of fraudulent representations by Myers & Greene beyond the recitals of the bond, to induce its execution by plaintiff in error, was properly rejected; that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, and further that where a party reaps the benefit which the bond gives in such a case, he is not permitted to repudiate the obligation he has assumed. Af-

firmed. In error to the Circuit Court of the Unite ! States for the District of Kansas. Opinion by Mr. Justice SWAYNE.—*George v. Tate.*

EVIDENCE—RECORD.—The account of a delinquent revenue officer, or other person accountable for public money, as finally adjusted by the proper officers of the treasury department, to be admissible as evidence under section 886 of the Revised Statutes, should be certified and authenticated to be a transcript from the books and proceedings of the department. It is not sufficient that the certificate states the account or accounts offered as evidence to be copies of originals on file. The latter is the form of certificate used in reference to mere copies of bonds, contracts and other papers, connected with the final adjustment, and which, duly certified and authenticated, have the same effect as the originals would have, if produced in court. Affirmed. In error to the Circuit Court of the United States for the Western District of Tennessee. Opinion by Mr. Justice HARLAN.—*United States v. Pinson.*

JURISDICTION—ADMIRALTY—SALVAGE.—This was a suit by a number of salvors to recover for a single salvage service. The amount of the recovery was $14,198; but in the division which the court below proceeded to make among the parties, some got less than $5,000. Upon a motion to dismiss or affirm, it is *held* that the owners can not be deprived of their appeal because the court below saw fit to apportion the recovery among the salvors. The decree is in legal effect one decree in favor of all the salvors. The motions are denied. Appeal from the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Chief Justice WAITE.—*Sinclair v. Cooper.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1881.

INTOXICATING LIQUORS — STATUTE — MINOR — PENALTIES.—1. In three actions of tort to recover the penalties provided by Statutes of 1875, c. 99, sec. 15, which forbids any person licensed to sell intoxicating liquor to sell or give the same to any minor under the age of twenty-one years, or to allow such minor to loiter upon his premises, under the penalty therein named, to be recovered by the parent or guardian in an action of tort, the declaration in each contained three counts—one, for selling intoxicating liquors to a minor son of the plaintiff; one, for giving intoxicating liquor to the same person; and a third, for allowing the same person to loiter about premises in which such liquors were sold. The cases were tried together without a jury. The evidence tended to prove, and the presiding judge found as a fact, that the minor sons of the several plaintiffs went together to the place occupied by the defendant, whom they found there; that one of said minors first called for lager beer, and the defendant furnished it to the whole party, for which said minor paid him; that they remained standing around in the bar-room and in a room adjoining about two hours, during part of which time they shook dice among themselves (the defendant joining) for the drinks, and each of them lost, and each of said minors bought and paid for ale or lager beer for the whole party; that, upon one occasion, the defendant was beaten in shaking dice, and thereupon furnished ale or lager beer to the whole party, without taking payment from anybody, and which was drunk upon the premises by them. Upon these facts the defendant claimed that neither of these plaintiffs could recover more than a single penalty, but the court held otherwise, and ruled that each plaintiff was entitled to recover upon each count of his or her declaration, to which ruling the defendant excepted. *Held*, that the question whether the same party may be liable for the several penalties for selling, giving, and permitting to loiter on the same day, must depend upon the facts proved. He is liable for selling to a minor, if the sale is proved. If, upon an independent occasion, he gives to a minor, his liability for that offense is fixed, and the fact that he has done another and different wrong, although committed about the same time, can not relieve him from liability for this wrong. The same remark is applicable to the acts which render him liable to still another penalty. More than one penalty can not be recovered by reason of the commission of a single act, but each particular penalty is to be recovered only upon proof of the commission of a separate and distinct act, or series of acts, differing from each other and independent of each other. 2. In one of said actions the plaintiff was the mother of the minor. The defendant asked for an instruction "that, in the absence of evidence that the boy had no father, and of evidence showing why such father did not or should not bring such suit, she could not maintain this action." *Held*, that it was not error to refuse this instruction. The action is given to the parent, not to the father. The court can not know, judicially, that there is a father, or even that there ever was a legitimate father. The fact that there is a father living, if that fact would defeat the action, is not to be presumed to exist without proof. Opinion by LORD, J.—*McNeil v. Collinson.*

PROMISSORY NOTE—SURETY—DURESS AS TO PRINCIPAL.—In an action upon a promissory note signed by A, and indorsed by B and C, who were all sued jointly, the referee, to whom the same was referred, found that A, being the financial secretary of a club, misappropriated the funds of said club to the amount of the note in suit, "under circumstances that would reasonably justify the parties interested in the suspicion that it was taken fraudulently." Said note was given in discharge of this liability. *Held*, that even if said note was executed by the defendant under duress, such duress would be no defense to the other de-

fendants. Opinion by MORTON, J.—*Bowman v. Hiller.*

SLANDER—MITIGATION OF DAMAGES—EVIDENCE.—1. In an action for slander it is competent for the defendant, in mitigation of damages, to put in evidence slanderous statements made by the plaintiff to a third person concerning the defendant, and by such third person communicated to the defendant before the speaking of the slanderous words by the latter. 2. The whole of the conversation in which slanderous words are used may be put in evidence by the defendant as a part of the *res gestæ*. Opinion by MORTON, J.—*Walker v. Flynn.*

TRUSTEE AND CESTUI QUE TRUST—COMPENSATION—SALE OF TRUST PROPERTY.—1. An agreement between *cestuis que trust*, who are *sui juris* and competent to act, and a trustee whom they desire to have appointed, that, in consideration of his assuming the trust, he shall receive for his services a fixed sum per year, is not invalid, if made without fraud or any undue advantage taken of them, and may and should be considered by the court in determining the compensation which the trustee is entitled to charge. 2. Where a part of the trust estate consisted of shares of a certain railroad company, which were purchased by the creator of the trust before his death, and which, when they came to the hands of the trustee, were appraised at par; and it appeared that the company met with reverses and ceased to pay dividends, and the value of its stock gradually decreased until it became nearly worthless, and the rustee declined, though requested by the *cestuis que trust*, to sell the stock and convert the same into more profitable securities, it was *held*, that in determining whether he would sell this stock, all that was required of the trustee was that he should act with good faith and in the exercise of a sound discretion. Opinion by MORTON, J.—*Bowker v. Pierce.*

TORT—CONVERSION—HUSBAND AND WIFE—RULING.—In an action of tort against the defendant, for the conversion of plaintiff's property, it appeared that the plaintiff bought a portion of the property, which was the stock of a livery stable, of third persons, with her own money, in good faith, and that the remainder was conveyed to her by her husband; that she allowed her husband to use said property in carrying on the business, for the use of which he agreed to pay her one-half of the profits of the business; that the attachments were made in several suits against her husband. The evidence as to which carried on the business was conflicting. The defendant requested the court to rule, as matter of law, upon the evidence, that the neglect of the plaintiff to file a certificate under St. 1862, c. 198 (providing that any married woman "doing business on her separate account" shall file a certificate setting forth the nature of the business, etc.), was a bar to her recovery in this case, and that the property, although owned by her, was liable to be attached by her husband's creditors. The court declined so to rule, but submitted the case to the jury, and instructed them, among other things, that they would consider whether the business was that of the wife, or that of her husband; and that if they should find that the business was hers, then, although the property was hers, it would be liable to be attached by the creditors of her husband, and she could not recover in this action; but if it was her husband's business, and the property hers, she could recover. The jury returned a verdict for the plaintiff for the value of the property, which she had bought from third persons. *Held*, that the verdict imported a finding that the conveyance by the husband to the plaintiff was fraudulent as to his creditors, and that the business was carried on by him; that, therefore, the wife's property could not be attached by her husband's creditors; and that the court rightly refused to rule as requested by the defendant. Exceptions overruled. Opinion by MORTON, J.—*Wheeler v. Raymond.*

SUPREME COURT OF ILLINOIS.

February 7, 1881.

SUBROGATION—TENANT IN COMMON PAYING MORTGAGE—INTEREST.—1. Where two persons purchased a tract of land, receiving a deed therefor, not in severalty, but to them in common, gave their joint notes for the unpaid purchase money, secured by their joint mortgage on the entire tract, and one of them died, so that the other was compelled to pay the whole amount of the notes and interest to save his own share in the land, it was *held*, that the party so paying off the incumbrance was entitled to contribution and to be subrogated to the rights of the mortgagee and to enforce the lien of the mortgage as to the money paid above his own proper share. 2. Where one of two tenants in common is obliged to pay off an incumbrance upon the entire estate to save his own interest therein, and the debt so paid by him is drawing ten per cent. interest on bill for contribution and to be subrogated to the rights of the holder of the incumbrance, he will be entitled to recover the same rate of interest. Affirmed. Opinion by WALKER, J.—*Simpson v. Gardiner.*

DEED—FORGERY—ESTOPPEL—TENANTS IN COMMON—CONTRIBUTION FOR IMPROVEMENTS—CHANCERY PLEADING.—1. Nothing short of clear and satisfactory proof, convincing beyond a reasonable doubt, can overcome the proof of the execution of a deed afforded by the certificate of its acknowledgment. 2. When a forged deed, purporting to have been made in 1868 by one brother to the other, was duly recorded, and in 1872, the brother, whose deed had been forged, agreed with the other to rebuild the buildings on the property which had been burned, soon after which the lat-

ter procured a large loan on the lots, giving a deed of trust thereon, and until some time in 1876, while the buildings were being erected, the former largely superintended their construction, and saw the trustee and agent of the lender from time to time examining the work to make advances on the loan as the work progressed towards completion, and paid contractors on checks drawn by the grantee out of the moneys so advanced, and when the buildings were completed, he drew leases in his brother's name, and collected rents for him, giving receipts in his brother's name, and placing the money to his brother's credit in the bank, which continued until 1876, and up to this time having never asserted any claim to the property, it was *held*, that by thus holding his brother out to the world as the sole owner, while the buildings were in progress, he was estopped to claim that his interest in the property should not be liable for his share of the cost of the improvements. 3. It is a familiar and elementary rule, that where a tenant in common makes necessary repairs on the property, necessarily purchases an incumbrance or outstanding title, or improves the property with the express or implied assent of his co-tenants, these all inure to the benefit of all the tenants, and the law requires each to contribute to the expense in proportion to his interest in the property. 4. All improvements placed on real estate by the owner while it is encumbered, inure to the benefit of the holder of the incumbrance, and their value can not be claimed against the lien, when they savor of the realty, but are subject to it. So, where one tenant in common, by the express assent of his co-tenant, places valuable buildings on the common property, and thereby acquires a lien on his co-tenant's interest for a proportionate share of the cost of the improvement, it will be an accession to his interest, which will be subject to a deed of trust given by him on the property, and it will pass to the trustee to the same extent, in the same manner and for the same reasons that the improvements became liable to the lien of the trust deed. 5. The acts and conduct of a party claiming a deed purporting to be made by him is a forgery, before such deed is placed on record, can have no bearing on the question as to the genuineness of such deed, and can not be used to contradict his testimony that the deed is not his. 6. Where one of two brothers being tenants in common of certain real estate, sold the same, making a warranty deed, and took back notes for the deferred payments, secured by trust deed on the property sold, and the other tenant in common, when called on by a bank officer to indorse some of the notes, said they were all right, but desired to see his brother before indorsing, and it appeared he never did indorse them, and after his brother's sale he ceased to collect rents for him, it was held that these facts could have no bearing upon a forged deed from him to his brother, not put upon record for about a year afterwards, and did not estop him from showing such deed a forgery. 7. As the statute contemplates that more than one tract of land, and even separate tracts in different counties, may be embraced in one bill for partition, a bill seeking partition of two distinct parcels of land, held by different claimants, and to have forged deeds made in his name for the same, set aside as clouds upon his title, is not multifarious, but the claimants of one lot of the land should only be taxed with one-half of the cost in such a case. 8. Courts of chancery will always exercise a sound discretion in determining whether the subject-matters of a bill are properly joined or not, and whether the parties, plaintiffs or defendants, are properly joined, each particular case, to some extent, depending upon its own facts. Reversed in part and affirmed in part. Opinion by WALKER, J.—*Baird v. Jackson.*

SUPREME COURT OF MISSOURI.

February 7, 1881.

JUDGMENT — INJUNCTION AGAINST — SUFFICIENT GROUNDS.—A petition for an injunction to enjoin defendant from levying execution under a judgment he had obtained before a justice of the peace, after stating facts which would have constituted a good defense before the justice, alleged that said facts first came to the knowledge of plaintiff since the rendition of the justice's judgment and the time allowed by law for an appeal. *Held*, that sufficient facts were not stated to entitle plaintiff to the relief sought. The plaintiff should have shown that the failure to discover and avail himself of such defense, was not attributable to any negligence or want of diligence on his part, but to fraud, accident or act of the opposite party; the mere allegation that he was ignorant of the facts constituting his defense is not sufficient. Taliaferro v. Bank, 23 Ala. 755; Story's Eq., sec. 895; Ritter v. Democratic Press Co., 68 Mo. 458. Affirmed. Opinion by NORTON, J.—*Carolus v. Koch.*

EJECTMENT—ESCROW—EVIDENCE OF WIFE, WHEN ADMISSIBLE—DEFECTIVE ACKNOWLEDGMENT BY WIFE—WHERE DEED CALLS FOR SALE AT COURT-HOUSE DOOR,—Ejectment and answer, consisting of a general denial, and as special defenses, that plaintiff's claim was by purchase under a deed of trust executed by defendant and wife; that the title was vested at the date of the deed in said wife, and that she did not execute the deed as the law directs, and that the note and deed of trust were obtained by fraud. 1. At the trial, defendant offered to prove that the deed of trust and note secured by it were executed in lieu of a note and deed of trust of a prior date for the same debt, and the latter were to be surrendered and canceled; and the later trust deed was to be held by one Spenser, and not to be delivered until

the first note and deed were delivered up and canceled. *Held*, that the rejection of the evidence was error, it going to show that the deed was in *escrow*, and had never taken effect, and was therefore admissible. 2. Defendant also offered to prove, by wife of plaintiff. that she could not read English, that the deed of trust was not read or explained to her, and that her signature was procured by the fraudulent representations of one of the beneficiaries in the trust deed. *Held*, that the wife, being neither a party to the suit nor an agent of the husband, was not a competent witness to prove above facts. Also *held*, that other evidence offered to prove same facts was admiisible. If the wife did not acknowledge the deed, as required by law, or if her signature was obtained by fraud, it did not pass her title, and under sec. 14, Wag. St. p. 935, it was ineffectual to convey her husband's interest. Clark v. Bank, 47 Mo. 17; Wannall v. Kem, 51 Mo. 150. 3. The trust deed provided in case of default on the note, that the land should be sold "at the court-house door in the City of Joplin, Jasper County, Missouri." *Held*, there being two court houses, one for the common pleas court at Ferguson Hall, and the other for the police court, at a different building, at the date of the execution of the deed, parol evidence was admissible to explain the one meant by the parties to the deed, and a sale made elsewhere was invalid (Napton v. Hunt, 70 Mo. 497); and the defense that the sale was invalid, because not made at the proper place, was not an equitable defense, and hence was admissible under a general denial. Reversed and remanded. Opinion by HENRY, J.—*Goff v. Roberts.*

CONTRACT — ACCEPTANCE OF BRIDGE BY COUNTY—DEFECTS—WAIVER.—Suit by Johnson County on bond for breach of same in not constructing a bridge according to contract. Defendant in his answer set out that the bridge was constructed as required by the contract; that it had been inspected by a commissioner appointed by the county court, who reported that it conformed to the contract, and that the county court had received it and paid for the same; defendant also averred that the plans and specifications provided for him were defective, and whatsoever defects might be found were the result thereof. Plaintiff and defendant offered evidence to sustain their respective issues, except that none was offered by defendant to show any defect in the plans. *Held*, that the acceptance of the bridge, and the payment therefor, did not amount to a waiver by the county of any defects in the bridge, of which its agents were ignorant at the time of such acceptance and payment. There must be both knowledge and acquiescence to constitute a waiver in such a case, (Haysler v. Owens, 61 Mo. 270), and the burden of proof was on the defendant to show that the county-court judges or the commissioner knew of the defects complained of when they accepted the bridge and paid for it. Any thing that defendant may have said to plaintiff, to induce him to accept the bridge, was admissible in evidence against him. Affirmed. Opinion by HOUGH, J.—*Johnson v. Lowe.*

ADMINISTRATOR'S DEED — EQUITABLE DEFENSE.—Where plaintiffs are heirs at law, the land which they claim being sold at an administrator's sale for the debts of their ancestor, the fact that the administrator's deed is lacking in a seal or formality, will not avail plaintiffs; for the purchaser at said sale acquires an equitable title which constitutes, when properly pleaded, a good defense to an ejectment. Long v. Joplin Mining Co., 68 Mo. 422. Reversed. Opinion by SHERWOOD, C. J.—*Snider v. Coleman.*

RECENT LEGAL LITERATURE.

DILLON'S CIRCUIT COURT REPORTS. VOL. V Cases determined in the United States Circuit Courts for the Eighth Circuit, reported by John F. Dillon, the Circuit Judge. Egbert, Fidlar & Chambers, Davenport, Iowa, 1880.

This admirable series of reports is too well and favorably known to the profession, for this concluding volume to need any other commendation from us than the statement that it is fully up to the standard of its predecessors. The majority of the cases contained in this volume are naturally upon the subjects about which litigation usually arises in Federal courts. Many of them are upon questions concerning Municipal Bonds, Municipal Corporations, Removal of Causes, Bankruptcy, National Banks, Federal Jurisdiction, Indians, Railway Mortgages, Patents, Revenue Laws, and other matters which are rarely litigated in the State courts, and consequently are of but little interest to those of the profession whose practice is chiefly or altogether before these tribunals. This class of lawyers, however, is constantly growing smaller with the growth of the importance and jurisdiction of the Federal courts and of the amount of business which they transact. There are, however, in this volume, many adjudications which are of interest even to the practitioner whose business lies chiefly in the State courts; notably Howenstein v. Barnes, (p. 482), as to a stipulation in a note for attorney's fees, and *lex loci contractus*; McCabe v. McKinstry, (p. 509), of the criteria between bailments and sales, and of warehouse receipts; *Re* Goodwin (p. 140), as to when an accommodation indorser is entitled to the rights of a surety; Hagan's Petition in Morgan v. Illinois, etc. Bridge Co., (p.96), as to imputed negligence and the burden of proof in damage cases; Phelan v. Hazard, (p. 45), and Steacy v. Little Rock, etc. R. Co., (p. 348), as to what is full-paid stock; Flint v. Russell, (p. 151), of nuisance, and the remedy by injunction; Lewis v. Kinney, (p. 159), of the partition of a steamboat; *Re* Kirkbride, (p. 117), of chattel mortgage with power of sale in the mortgagor.